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No. 10-649

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IN THE
Supreme Court of the United States

APOLLO GROUP, INC., TODD S. NELSON, AND KENDA B. GONZALES,
Petitioners,

v.

POLICEMEN'S ANNUITY AND BENEFIT FUND OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

Petitioners attempt to paint this case as involving broad questions of securities law, but in fact the dispute presented is narrow and fact-specific. In its current posture, the case presents one question:

> Whether the record evidence was sufficient for a properly instructed jury to find that a stock analyst's reports issued on September 20, 2004, immediately before an economically and statistically significant decline in the stock price of corporate petitioner Apollo Group, Inc., were corrective disclosures that respondent could employ as part of its proof of loss causation.

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INTRODUCTION

Petitioners Apollo Group, Inc., its former chief executive officer Todd Nelson, and its former chief financial officer Kenda Gonzales (collectively, "Apollo") seek review of a jury verdict finding them liable for securities fraud. After weeks of testimony, including expert testimony on both sides about the behavior of Apollo's stock price, the jury found that Apollo defrauded its investors by making misrepresentations about a highly critical report by the U.S. Department of Education ("DOE") that had major implications for Apollo's future prospects.

Apollo now seeks to escape that verdict by asking the Court to rule that too much time passed between the date that its fraud was revealed and the date that its stock price fell, thereby precluding its investors as a matter of law from proving that they were harmed by its fraud. Any such rule would be inapplicable here, because the jury, dutifully applying the instructions Apollo concedes are correct, actually found a stock price decline that came immediately after a fraud-revealing disclosure and continued into the next day. That finding is not only correct and consistent with every court of appeals decision on analogous facts, but also far too fact-specific to warrant this Court's review.

Apollo also seeks a second rule: that information received by the market cannot reveal a fraud if it constitutes analysis of, synthesis of, or commentary on previously disclosed information. That rule, too, cannot apply on the facts necessarily accepted by the jury: that fraud in this case was revealed by an investment analyst who found new, fraud-related information about Apollo that alerted investors to the increased risks arising from the DOE Report and

the corrective actions demanded by DOE and taken by Apollo in response to the Report.

Apollo's arguments in favor of review are unpersuasive. Cases involving months-long gaps between the revelation of the fraud and the fall in the investor's stock price are simply inapposite, as is any tension between the circuits over how to approach such scenarios. The court below rightly perceived this case as a fact-specific application of well-settled law, and there is no reason for this Court to review that judgment.

STATEMENT OF THE CASE

Apollo is the largest for-profit institution of higher education in the United States. The University of Phoenix ("UOP") accounts for 95% of Apollo's revenues. UOP in turn derives 60% of its revenues from federal student loans issued under Title IV of the Higher Education Act of 1965 ("Title IV"). To receive funds from Title IV loans, UOP needed (and had) a program participation agreement with DOE. That agreement "condition[ed] . . . [UOP's] eligibility" for Title IV loans on (among other things) a prohibition on making "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities." 20 U.S.C. § 1094(a)(20). This case is about misrepresentations and omissions from Apollo to its investors about a DOE report finding that UOP had violated that prohibition and demanding corrective action to address the violations, as well as about the consequences for UOP's future business from DOE's finding.

Apollo seeks judgment as a matter of law after an adverse jury verdict following instructions that

in relevant part largely tracked those submitted by Apollo (and that Apollo admits were "correct[]," Pet. 10). A court "entertaining [such] a motion" must "review all of the evidence in the record" and must "draw all reasonable inferences in favor of the nonmoving party." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151 (2000). It "may not make credibility determinations or weigh the evidence." *Id.* Respondent sets forth the following summary of the evidence in light of that standard.

1. In August 2003, the DOE began a "Program Review" of UOP's compliance with Title IV. The Program Review included witness interviews, site inspections, and a lengthy document review. It was followed by a Program Review Report (the "Report"). On February 5, 2004, Apollo received a copy of the Report from DOE. Excerpts of Record ("ER") 370.

The Report's findings were damning. As DOE summarized it, the Report made "a serious finding" that UOP was using an "improper incentive compensation system for those involved in recruiting activities" and was "systemically engag[ing] in actions designed to mislead [DOE] and to evade detection" of its misconduct. *Id.* DOE described these findings as showing a "substantial breach of [UOP's] fiduciary duty." *Id.* Among other things, the Report found that "UOP bases [recruiters'] salaries solely on the number of students they enroll," ER379, and that UOP employed "evasion" and "euphemisms" to conceal "the fact that UOP pays distinct and significant financial incentives solely based on recruiters' success in securing enrollments," ER396.[1]

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[1] These findings were particularly damaging to Apollo because, as the evidence later showed, it previously had an excellent reputation for regulatory compliance. As one analyst put

In the Report, DOE demanded that Apollo take corrective actions, including "substantial and comprehensive changes to the salary compensation system for its recruiters and their direct supervisors." ER401. In June 2004, Apollo changed its compensation plan for its recruiters by including explicit weighted percentages for the different factors that were used to determine compensation. ER222-25. The change prevented recruiters' supervisors from making salary determinations based solely on the number of enrollments that a recruiter obtained. ER223-24.[2] Apollo "[s]ubmit[ed]" the new compensation plan for review by DOE as part of a "corrective action plan to respond to [DOE's] concerns" in order to obtain "closure" with DOE and avoid "similar findings in the future." ER367-68.

In addition, on September 1, 2004, Apollo paid $9.8 million to DOE as part of a settlement of the dispute arising out of the Report. This payment was the largest fine ever imposed by DOE on a for-profit university. ER63-64.

2. The jury was asked to consider whether Apollo made "an untrue statement of material fact or omit[ted] a material fact necessary under the circumstances to keep the statements that were made from being misleading" when publicly discussing its relationship with DOE and the program review

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it, the investment community had perceived Apollo as being as "pure as the driven snow." ER672 (internal quotation marks omitted).

[2] Apollo's chief human resources officer testified that the June 2004 changes to Apollo's compensation plan were "material" and that any time "you change something material as compensation" it creates risks of increased employee dissatisfaction and lower productivity. ER224, ER227-28.

throughout the class period. As to each statement the jury answered "yes." *See* App., *infra*, 1a-2a (Verdict Form).[3] Petitioners did not disclose the existence of the DOE Report until announcing the settlement with DOE, and the jury was asked whether petitioners Apollo and Nelson then continued to mislead the market about the Report's highly negative findings about Apollo's recruitment compensation scheme. The jury answered "yes." *See id.* at 2a-3a, 6a-7a. The verdict reflects the jury's conclusion that petitioners never revealed that DOE had demanded that Apollo make comprehensive changes to its system for compensating recruiters or that Apollo had made such changes. Not until September 20, 2004, was there a full, adequate disclosure of these facts and their implications on Apollo.

As an example of these false and misleading statements, in March 2004, more than five weeks after receiving the Report, petitioner Todd Nelson (who was then Apollo's CEO) mentioned to industry analysts during a conference call that DOE had conducted a "normal" and "ongoing program review." ER511. When asked "when *any* type of report will be issued" by DOE, Nelson answered that it was "tough to say." ER515 (emphasis added). He also told the analysts that Apollo was "very comfortable" that the program review would lead to "nothing that would be material." *Id.* In fact, Nelson consciously recognized that the Report and the changes it required were material to Apollo, and he sought to prevent the pub-

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[3] The knowingly false or misleading character of Apollo's corporate statements was found by the jury, *see* App., *infra*, 2a-3a, and is not challenged in Apollo's petition. The same is true for the individual petitioners. *See id.* at 6a-7a (Nelson), 9a-10a (Gonzales).

lic release of the Report by writing to the Secretary of Education, urging that DOE not publicly release the Report. ER353. In response, DOE did not release the Report. Upon examination at trial, Nelson was asked whether he had contemporaneously believed that public release of the report would "adversely impact the stock price of Apollo's securities," and he answered: "Absolutely, yes." Trial Transcript ("Tr.") 1103.

On September 7, 2004, shortly after its agreement to pay DOE $9.8 million, Apollo issued a press release stating that it was "pleased to announce" an "agreement" with DOE "to resolve . . . the [UOP] program review." ER568. The press release minimized the significance of the resolution with DOE by disclosing it along with several other pieces of information, including the positive news that Apollo would be expanding into Mexico. It contained no substantive information about the contents of the Report.

The same day, Nelson told analysts about the settlement of the DOE program review and in doing so he made several false and misleading statements. He described the Report merely as an "interim report"[4] with a "negative tone." ER572. He said that Apollo had "decided to settle this issue now rather than later for $9.8 million and put it behind us," assuring the market that the settlement would "take[] away, hopefully, any clouds that may be lingering with regulatory issues." ER572.

Nelson also said that the settlement would not "have a material impact on the growth of the com-

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[4] On August 26, 2004, DOE had advised Apollo that it "d[id] not consider the [Report] to be an 'interim' report" and that the Report was a "discrete final action" by DOE. ER547.

pany or our financial performance." ER572. He mentioned the company's new compensation scheme, which he said would make it more "transparent," but stated that it was "unrelated" to the dispute with DOE. ER574. He did not disclose to the market the substance or contents of the Report; in particular, he said nothing about DOE's finding that Apollo had engaged in systemic deception, nor did he disclose DOE's demand for comprehensive changes to Apollo's compensation scheme for recruiters – the engine of Apollo's revenue.

3. On September 8, 2004, several Wall Street analysts, none of whom had actually read the Report, issued reports accepting Apollo's claim that its regulatory problems were over. One analyst writing on September 8 described the disclosure as a "positive for the company" that "could put to rest some of the potential 'noise' . . . related to the program review." ER658. Another described the settlement as "remov[ing] virtually every material legal/regulatory issue" faced by Apollo. ER674. Notably, analyst Kelly Flynn of UBS Investment Services issued a report on September 8, 2004, adopting this theme and suggesting that the settlement "***may reduce [Apollo's] near-term event risk.***" ER624. Apollo's stock price had been $82.72 on September 7. It dropped slightly to $82.07 on September 8, and further to $80.50 on September 9. ER602-03.

On September 14 and 15, several newspapers published articles describing some of the Report's findings. The articles related some of the Report's negative findings and noted that Apollo had "disclosed few details" about the Report's contents. ER672. The articles also quoted Nelson describing the Report as "very, very unfair," ER580, and "totally

false," ER672. Neither these newspaper articles nor the prior analyst reports contained any details about the material changes to Apollo's compensation system made in response to the Report or revealed that those changes were material and increased the operating risks associated with its future prospects. Apollo's stock price had been $80.63 on September 13. It dropped slightly to $80.09 on September 14, and further to $78.68 on September 15. ER603.

On September 20, having received and read the Report, education specialist Kelly Flynn of UBS Investment Services, who had issued a report on September 8, *see supra* p. 7, released two investment analyses about Apollo. She concluded that "the contents of the [Report] may cause more concerns about [Apollo's] regulatory risk," ER502, and that Apollo's "enrollment growth [could] be hurt by," among other things, "increasing enrollment advisor turnover," ER491. She also reported that current and former recruiters had told her that "internal enrollment targets were getting harder to hit" and that "turnover ha[d] increased since [the] 6/04 intro[duction] of [the] new comp[ensation] plan." ER502. Flynn was the first investment analyst to review the report and was also the first to interview Apollo's recruiters. Apollo's stock price had been $78.35 on September 17 (a Friday). It immediately dropped to $75.82 on September 20, and further to $72.00 on September 21. ER603. This two-day decline was statistically significant.

4. On October 12, 2004, a complaint was filed against Apollo for securities fraud. Respondent was appointed lead plaintiff by the district court. The district court denied Apollo's motions to dismiss and for summary judgment, and certified a class of inves-

tors in Apollo's stock. A jury trial commenced on November 14, 2007, and lasted 22 days.

Loss causation was a heavily contested issue at trial. Both sides presented expert evidence about the significance of the Report and the subsequent disclosures, particularly Flynn's September 20 reports. Dr. Steven Feinstein, an economist testifying for the investors, conducted an event study and gave an opinion that identified new information contained in the September 20 reports that revealed the fraud. Dr. Feinstein's analysis parsed out other factors that could have otherwise impacted Apollo's stock price, including the movement of the stocks of the for-profit education sector, other non-fraud-related factors, and previously disclosed information. Tr. 1977-87; ER161-64. Apollo's expert, Dr. Kenneth Lehn, conducted an event study that confirmed that Apollo's stock price decline between September 20-21 was statistically significant. Tr. 3456-57; Trial Exhibit ("Ex.") 24281, at 472-75. This point was uncontested at trial. Both experts agreed with the price data and calculations used by the other and both agreed that their analyses were designed to account for "random" movement. ER90, ER259-61, ER263; Tr. 2003-04. Despite this, and while acknowledging that "there's only a 5 percent chance that what you are seeing is random," Dr. Lehn contended that the statistically significant stock decline was due to "random" chance. ER263.

At the close of the investors' case, Apollo sought judgment as a matter of law, contending that the investors could not prove loss causation because Flynn's analysis did not contain "new facts . . . that demonstrate[d] the falsity of something that [Apollo] had previously . . . said." Tr. 2254. The district court

denied that motion, finding that the "jury c[ould] conclude that the facts . . . dribble[d] into the marketplace" over time, and that Flynn had "connect[ed] the dots in such a way that they became the corrective disclosure." ER209.

The district court instructed the jury that "the alleged misrepresentations and omissions in this case could have caused the plaintiff to suffer damages only if you determine that the analyst reports issued by Kelly Flynn on September 20, 2004 were corrective disclosures" and that, "[i]f you conclude that these reports were not corrective disclosures, then you cannot find that a misrepresentation or omission caused the plaintiff to suffer damages." ER298-99. Petitioners acknowledged that "this instruction is aimed at preventing . . . the jury from looking at . . . [earlier] disclosures and . . . by making them determine that the Flynn report was a corrective disclosure." Tr. 3783-84.

So instructed, the jury gave a verdict in favor of the investors on every element of a Rule 10b-5 claim, finding that Apollo had made (i) false or misleading statements (ii) upon material matters (iii) with scienter (iv) proximately causing damage to the investors. Nelson's statements on the September 7, 2004 conference call announcing Apollo's settlement with DOE were among the statements that the jury found fraudulent. *See* App., *infra*, 5a.

5. On August 4, 2008, the district court granted Apollo's renewed motion for judgment as a matter of law, departing from its earlier reasoning and ruling that there was no evidence to support the jury's finding on loss causation. The court first rejected Apollo's argument that, as a matter of law, "a market analyst's opinion . . . is not, and never can be, a

'corrective disclosure.'" Pet. App. 8a. The court expressed concerns that such a rule would "give companies [a] perverse incentive to engage in opaque, piecemeal disclosures," and "encourage corporate gamesmanship." *Id.* at 9a. The court further observed that the Third Circuit had expressly declined to adopt any such rule in *In re Merck & Co., Inc. Securities Litigation*, 432 F.3d 261 (3d Cir. 2005).

The district court, however, did accept Apollo's narrower, case-specific argument that "the Flynn reports were not necessary to reveal the fraud in this case because they did not provide any new, fraud-revealing analysis." Pet. App. 10a. In doing so, the court stated that "Flynn was not the first to tie future regulatory problems to the DOE report" because the September 14 and 15 articles had already done so. *Id.* at 11a. It stated that the link Flynn drew between the Report and increased turnover among Apollo's recruiters was "factually wrong" and therefore could not "possibly be corrective information," and also that the investors "did not present any evidence linking this claim to Apollo's misrepresentations." *Id.* Finally, the court stated that it did not matter that Flynn was the first analyst to read the DOE Report because she "did not disclose any of the [Report's] contents" to the market. *Id.* at 12a.

In a footnote, the district court also acknowledged that the investors had presented two additional grounds for concluding that Flynn had made a corrective disclosure: "(1) Flynn's statement that enrollment counselors had reported that enrollment targets were getting harder to hit; and (2) the fact that the UOP had adopted a new compensation plan." *Id.* at 12a n.3. The court rejected those additional

grounds because it found they were not "linked in any way to Apollo's prior misrepresentations." *Id.*[5]

6. On March 3, 2010, the Ninth Circuit reversed in an unpublished memorandum opinion. The panel (Kozinski, C.J., Fletcher, J., and Gettleman, D.J., by designation) disposed of Apollo's loss-causation claim by reasoning that "[t]he jury could have reasonably found that the UBS reports following various newspaper articles were 'corrective disclosures' providing additional or more authoritative fraud-related information that deflated the stock price." Pet. App. 2a. On August 17, 2010, the court of appeals denied rehearing and rehearing en banc.

REASONS FOR DENYING THE PETITION

I. APOLLO HAS FAILED TO SHOW ANY RELEVANT CONFLICT IN THE CIRCUITS

A. There Is No Relevant Circuit Conflict About the Timing of Corrective Disclosures

Apollo contends that the circuits are divided on the question whether a price decline "weeks or months" after a corrective disclosure is sufficient to support loss causation as a matter of law. Pet. i. This case does not present that question because the jury was, as petitioners acknowledged, correctly instructed that it could *only* find for the investors if it found that Flynn's September 20 reports were corrective disclosures. *See supra* p. 10. The jury *did* find for the investors: therefore, it concluded that Flynn's

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[5] The district court also rejected Apollo's motion for a new trial, its various evidentiary challenges, and its attempt to obtain remittitur. The court of appeals upheld these rulings, and Apollo has not challenged them in its petition.

September 20 reports were corrective disclosures.[6] The jury's necessary finding of loss causation from the immediate stock drop on that day and the following day, therefore, involves no delay of "weeks or months."

Further, even if the jury had relied upon the September 14 and 15 newspaper articles as additional corrective disclosures, the delay between those dates and the end of the stock price decline was only four trading days. Apollo argues repeatedly that this case involves a delay of as long as "two weeks," Pet. 9, 13, 18, but in doing so simply ignores the jury's finding that Apollo's initial announcement on September 7 was itself materially false and misleading, *see* App., *infra*, 1a-2a, 5a, and so could hardly have been a corrective disclosure. Apollo does not challenge (or acknowledge) that finding in its petition. Its contention that this case involves a two-week delay between the revelation of fraudulently concealed information and the market's reaction to that revelation is therefore unsupported by the record.

In any event, Apollo substantially overstates the disagreement among the circuits and mischaracterizes the cases upon which it relies. All of them can be straightforwardly distinguished from this case.

First, Apollo cites (at 15-16) *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000) (Alito, J.), in which the Third Circuit stated that, "in an efficient market, the materiality of disclosed information may be measured post hoc by looking to the movement, in the period immediately following disclosure, of the price of the firm's

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[6] "A jury is presumed to follow its instructions," especially where, as here, "each of the jurors affirmed in open court the verdict." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *see* Tr. 4120-22.

stock." *Id.* at 282. The Third Circuit's statement in *Oran*, however, must be read in light of the facts of that case, which involved a delay of more than two months between the disclosure of concealed information and the price drop for which investors sought to recover. *See id.* at 280, 282-83 (disclosure on July 8, 1997; price drop beginning on September 15, 1997).[7] *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410 (3d Cir. 1997) (Alito, J.), the other Third Circuit case on which Apollo relies, similarly involved a delay of "*approximately two months*" between the disclosure of concealed information and its effect on the company's stock price. *Id.* at 1425.

The Third Circuit's conclusions in those cases that a two-month delay in market reaction precluded a securities-fraud plaintiff from showing materiality as a matter of law are irrelevant to the present case. It is entirely consistent with *Oran* and *Burlington Coat Factory* to hold that a jury could reasonably find loss causation in light of the far shorter interval at issue here (whether that interval is considered to be the day of the fraud-revealing disclosure and the following day, or four trading days). Indeed, the Third Circuit has clarified that it has not adopted any requirement that the price change "instantaneously." *Merck*, 432 F.3d at 269 (considering a stock's behavior over the month following a disclosure).

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[7] The Third Circuit also observed that the defendant company's "share price rose by $3.00 during the four days after the [July 8] disclosure." *Oran*, 226 F.3d at 283. Nevertheless, given the far longer two-month delay actually presented by the facts it confronted, the Third Circuit cannot be considered to have held in *Oran* that any delay here dispels materiality as a matter of law.

Second, Apollo also erroneously relies on *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628 (11th Cir. 2010). Apollo claims that the Eleventh Circuit "h[eld] that a plaintiff's theory of loss causation was 'frivolous' where the stock price did not react following an initial alleged corrective disclosure, but declined 22 days later following a second alleged corrective disclosure." Pet. 16 (quoting *Thompson*, 610 F.3d at 689). Apollo also attributes to the Eleventh Circuit the statement that investors cannot prevail by "'measur[ing] loss causation over twenty days after the market had learned of the alleged fraud.'" *Id.*

The language Apollo quotes, however, does not come from the majority opinion in that case, but from Judge Tjoflat's partial dissent.[8] The *Thompson* majority did not reach any question of loss causation, but instead upheld the district court's dismissal of a securities-fraud complaint for failure to plead scienter and failure to plead secondary liability. The court then remanded for a determination of Rule 11 sanctions rather than itself holding that the claims were frivolous. *See* 610 F.3d at 633-39. Apollo's careless mischaracterization of a dissenting position as a holding offers no support for its petition.

Third, Apollo relies (at 17) on the Second Circuit's opinion in *In re Omnicom Group, Inc. Securities Litigation*, 597 F.3d 501 (2d Cir. 2010), which involved a delay of a year between the disclosure of allegedly concealed information and its effect on the company's

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[8] *See Thompson*, 610 F.3d at 639 (start of Judge Tjoflat's opinion); *id.* at 689 (passage quoted by petitioners). Judge Tjoflat was in dissent because he thought that the court of appeals should itself impose sanctions in the first instance, which was the subject of his loss-causation argument at page 689.

stock price. *See id.* at 511. But Apollo concedes, as it must, that, "[w]ith such a long time lag, the Second Circuit did not have occasion to opine about just how quickly the market must react." Pet. 17. That concession gives up the game: the whole point of Apollo's arguments is the supposed conflict "about just how quickly the market must react."

Apollo nevertheless suggests that the Second Circuit took a position on that issue by stating that the market "'promptly digested'" relevant information. *Omnicom*, 597 F.3d at 511. That phrase, however, was merely a quotation from the complaint in that case, *see id.*, and is not the stuff of precedent. Later panels and district courts in the Second Circuit will not be bound by the language the *Omnicom* investors chose to use. And, even if they somehow were, the word "promptly" would encompass a time period of the day of the fraud-revealing disclosure and the next day, or four trading days, depending on the circumstances.[9]

Fourth, Apollo concedes (at 18-20) that the Ninth Circuit's decision in this case was consistent not only with its own precedent, but also with the precedent of the Fifth and Sixth Circuits. The decisions it cites do indeed support the decision of the Ninth Circuit

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[9] Apollo further argues that *Teamsters Local 445 Freight Division Pension Fund v. Bombardier Inc.*, 546 F.3d 196 (2d Cir. 2008), is relevant to the conflict it seeks to establish. Not so. *Teamsters Local 445* held only that, after hearing expert evidence, a district court acting as factfinder did not clearly err in finding that an investor had failed to prove that the market for a particular security was efficient, based in part on evidence that the security's price had not moved in response to certain information. *See id.* at 207-10. That case did not involve any determination of materiality or loss causation as a matter of law.

– each of them considered a time period between disclosure and price drop substantially longer than the one at issue here, yet held that the period's length did not foreclose recovery as a matter of law. It is worth emphasizing, moreover, that (as Apollo admits, at 20) the Sixth Circuit cited Third Circuit precedent with approval when it held that investors could state a claim involving a price drop that occurs incrementally on separate disclosures over a period of six weeks. *See City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651 (6th Cir. 2005) (quoting *Burlington Coat Factory*, 114 F.3d at 1425). The *Monroe* court thus does not appear to have perceived any relevant conflict.

Ultimately, to the extent there are differences among the circuits on the permissible length of such a period, they concern periods of two to three months. For periods of that length, *Oran* and *Burlington Coat Factory* suggest that the Third Circuit would deny recovery as a matter of law, and *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920 (9th Cir. 2003), and *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1993 (2009), suggest that the Ninth Circuit would leave the question to a jury. This case, however, would not be a suitable vehicle to resolve that question. If the Court affirmed the judgment of the Ninth Circuit, it might well leave open the possibility that the longer periods at issue in petitioners' cited cases were still too long. And the Court would have no basis to reverse the judgment below under the question presented by petitioners without encroaching on the province of the properly instructed jury's findings of fact given the record evidence.

B. There Is No Circuit Conflict Regarding the Treatment of Analyst Reports

Apollo also contends that the circuits are divided on the question whether an investor may prove loss causation by relying on "an analyst['s] . . . report that merely synthesizes and comments upon . . . already-public information." Pet. i. This case does not present that question because Flynn's September 20 reports – the corrective disclosures on which the jury relied in this case – did more than merely synthesize and comment on already-public information: they provided the market with *new* fraud-revealing information, gleaned from Flynn's review of the DOE Report and from her interviews of current and former UOP recruiters, about the long-term significance of the Report, UOP's new compensation plan, and its likely effect on Apollo's prospects. *See supra* p. 8 and *infra* pp. 28-31 (describing the specific new information that Flynn provided to the market on September 20).

In any event, Apollo again overstates its case. None of the cases it cites supports a categorical rule that a corrective disclosure may not arise out of an analysis or commentary that reveals a fraud by using publicly available information. Thus, even if Flynn had relied only on publicly available information in her September 20 report (which she did not), the Ninth Circuit's decision would not implicate any intercircuit conflict.

First, Apollo relies (at 20-22) on *Merck*, in which the Third Circuit considered a company's disclosure that it had adopted a new accounting method. The effect of the new method on the company's reported revenues was possible to derive using a "handful of calculations." 432 F.3d at 270. The calculations

were made by a journalist a few months after the company's initial disclosure. The Third Circuit held that, because the calculations were of "minimal . . . complexity," the journalist's article showing their results was not a corrective disclosure: the information was all previously available to the market. *Id.*

As the district court noted, *see* Pet. App. 9a, the Third Circuit in *Merck* carefully *avoided* announcing a rule that analysis of existing information could never amount to a corrective disclosure. Instead, stating that it did not "wish to reward opaqueness," the court "decline[d] to decide how many mathematical calculations are too many" in order for an analysis to constitute new information. *Merck*, 432 F.3d at 271. As a result, *Merck* cannot be read nearly as broadly as Apollo suggests. Instead, it invites a case-specific determination of whether a particular analysis rises to the requisite level – which does not conflict with the Ninth Circuit's approach here.

Second, the other cases on which Apollo relies (at 20-22) are similarly far afield. In *Teachers' Retirement System of Louisiana v. Hunter*, 477 F.3d 162 (4th Cir. 2007), the Fourth Circuit held that the description in a court filing of certain transactions that a company had already disclosed years ago in filings with the Securities and Exchange Commission was not a corrective disclosure. *See id.* at 187-88. The case did not involve any analysis, synthesis, or commentary, much less adopt a rule that such matters are irrelevant. It therefore cannot be read as creating any conflict with the judgment below.

In *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330 (5th Cir. 2010), the Fifth Circuit stated that a corrective disclosure cannot be merely "[c]onfirmatory information [that]

is already known to the market and, having been previously digested by the market, will not affect the stock price." *Id.* at 337. As with *Teachers*, *Halliburton* did not involve any analysis, synthesis, or commentary: the examples of "confirmatory" statements that the court identified involved comparing a statement *by the defendant* to an earlier statement by the defendant and concluding that it had concealed nothing material. *See id.* at 340, 343 n.50.

In *Omnicom*, the Second Circuit rejected a claim that a newspaper article constituted a corrective disclosure because there was "no ambiguity" that it did not "even purport to reveal some undisclosed fact with regard to . . . specific misrepresentations in the complaint." 597 F.3d at 512. The court further rejected comments from two accounting professors quoted in the article as mere "conclusory suspicions." *Id.* *Omnicom* certainly stands for the proposition that *some* newspaper articles amount to mere "negative characterization[s]" that do not tell the market anything new. *Id.* But, like *Merck*, *Teachers*, and *Halliburton*, it falls far short of the categorical rule that Apollo seeks. And Apollo's erroneous reliance (at 20-22) on Judge Tjoflat's dissent in *Thompson*, 610 F.3d at 690-61, and mischaracterization of that dissent as the law of the Eleventh Circuit, offers no support for its claim of a conflict. *See supra* p. 15.

Third, to bolster its claim of a conflict, Apollo relies heavily on the Ninth Circuit's statement that "the jury could reasonably have found that the UBS reports following various newspaper articles were 'corrective disclosures' providing additional or more authoritative fraud-related information." Pet. App. 2a. Apollo cannot dispute, however, that a report that provides "additional" information is properly a

corrective disclosure. But Apollo's criticism of the Ninth Circuit for "ignor[ing] the critical fact that the Flynn reports did not disclose any additional facts" (Pet. 22 (internal quotation marks and emphasis omitted)) simply asks this Court to second-guess the jury's fact-finding province and offers no basis for this Court to grant certiorari on a question of law.

Apollo contends further that the Ninth Circuit's use of the word "authoritative" reveals a circuit conflict, because (it says) other circuits would not consider whether a statement was made by an "authoritative" source. Pet. 21. As we have shown, Apollo has failed to establish that *any* other circuit follows the categorical rule it seeks. Regardless, the Ninth Circuit's choice of that particular word in an unpublished per curiam opinion would not warrant review – especially because the record shows that the jury here could reasonably have found that Flynn's reports *did* provide the market with information that was "additional" as well as "more authoritative." *See infra* pp. 28-31.

II. APOLLO HAS FAILED TO SHOW ANY CONFLICT WITH *BASIC* OR *DURA*

A. *Basic* Expressly Declined To Adopt the Timing Rule Apollo Seeks

In *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), this Court adopted the fraud-on-the-market theory as a means of proving reliance in class actions. That theory "is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business." *Id.* at 241. As a result, "[m]isleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the

misstatements." *Id.* at 241-42. The theory creates a "rebuttable presumption of reliance" on misleading statements by those who buy stock during a time at which the price has been influenced by material misrepresentations. *Id.* at 242.

In doing so, the *Basic* Court expressly declined "conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." *Id.* at 248 n.28. It also made clear that it was not attempting to "determine by adjudication what economists and social scientists have debated through the use of sophisticated statistical analysis and the application of economic theory." *Id.* at 246 n.25.

Apollo contends, however, that the principle adopted in *Basic* requires the conclusion that "efficient stock markets generally respond to new information within one day." Pet. 24.[10] To support this contention, Apollo cites nothing in *Basic*, but instead relies on a 1991 article reviewing the economic literature on the efficient-market hypothesis. *See id.* Apollo thus argues that *Basic* adopted a "particular theory of how quickly and completely publicly available information is reflected in market price," *Basic*, 485 U.S. at 248 n.28, while ignoring the Court's statement that it was not doing any such thing.

Indeed, the Ninth Circuit's decision in *America West*, one of the primary targets of Apollo's criticism, contains a careful discussion of *Basic*, including the Court's refusal in footnote 28 to tie the fraud-on-the-market theory to a wholesale adoption of the efficient-

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[10] Here, the market responded immediately to the fraud-revealing disclosure the very day of the disclosure and the next day.

market hypothesis. *See* 320 F.3d at 934 & n.12. It is Apollo's argument, rather than the decision of the court of appeals, that runs counter to *Basic*.

B. *Dura* Did Not Draw the Fact-Opinion Distinction that Apollo Urges

In *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), this Court held that the Private Securities Litigation Reform Act of 1995 requires investors to "adequately allege and prove the traditional elements of causation and loss." *Id.* at 346. In reaching that conclusion, the Court quoted a comment to § 548A of the Restatement (Second) of Torts (1977), which "says that a person who 'misrepresents the financial condition of a corporation in order to sell its stock' becomes liable to a relying purchaser 'for the loss' the purchaser sustains 'when the facts . . . become generally known' and 'as a result' share value 'depreciate[s].'" *Dura*, 544 U.S. at 344.

Apollo's claim that *Dura* supports its position relies entirely on *Dura*'s use of the word "facts" in this passage. It argues that, by using that word, the Court established that "[a]nalyses, opinions, and predictions cannot be 'corrective' within the meaning of *Dura*." Pet. 28. This is a remarkable feat of overreading. *Dura* does not discuss the significance of analyses, opinions, and predictions in proving loss causation; none of those issues was contested in that case.

Instead, *Dura*'s only significance for this case is that it establishes the investors' burden to prove by a preponderance of the evidence that Apollo's fraudulent misrepresentations caused their losses. Apollo's contention that *Dura* (which does not even use the phrase "corrective disclosure") augmented those basic requirements with specialized burdens of pleading

and proof is without support in this Court's language or reasoning.

III. THIS CASE IS AN UNSUITABLE VEHICLE FOR CONSIDERING THE QUESTIONS APOLLO SEEKS TO PRESENT

A. This Case Is Fact-Specific and Record-Intensive, and Apollo Has Not Preserved Any Materiality Question

Apollo's failure to show any conflict of authority relevant to the Ninth Circuit's unpublished per curiam decision in this case would alone support a denial of review. Even if this Court were persuaded to develop the law of loss causation, however, this case would be an unsuitable vehicle for doing so. There are at least three reasons why.

First, the judgment of the Ninth Circuit is firmly supported by the ground that the jury here found (after receiving undisputedly correct instructions) that Flynn's September 20 reports were corrective disclosures and that the drop in Apollo's stock price occurred immediately and continued into the next day. If this Court were to grant review, the investors could and would defend the judgment below on that fact-specific basis. If the Court upheld the judgment on that ground, it would have no occasion to reach the broader questions of law that Apollo argues in its petition, and its decision would have little significance except to the parties in this case.

The oral argument in the court of appeals makes it quite clear that the judges perceived this fact-specific ground for affirmance. Chief Judge Kozinski observed that the September 20 reports were "the first time there was a public disclosure about the high turnover

and its effect on the profitability of the company."[11] Judge Gettleman expressed the view that the September 20 reports gave "good reasons for [downgrading Apollo's stock] that I don't think were ever articulated before . . . based on facts that were articulated for the first time in this report."[12] Judge Fletcher stated that "the things that are in the [UBS] Report[s] seriously contradict numerous statements by Apollo" and that "the jury could readily conclude that they are fraud revealing."[13] There is every reason to think that this Court would conclude likewise after hearing argument on the merits and reviewing the full trial record placed before the jury.

Second, the procedural posture of this case makes it an unattractive vehicle for another reason as well. This is an evidentiary challenge to a jury verdict reached after 22 days of trial and thousands of pages of testimony. Reviewing the record in such a case is not a good use of this Court's limited resources.[14] Because relatively few securities-fraud cases ever reach trial, a decision that applies a post-verdict standard is less likely to provide useful guidance for the lower courts than would an otherwise similar case at the pleading or summary judgment stage.

Third, Apollo has limited the questions presented to the issue of *loss causation*. *See* Pet. i. The Third

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[11] Audio Recording of Oral Argument in Policemen's Annuity Benefit Fund of Chicago v. Apollo at 25:36-26:26, No. 08-16971 (9th Cir.), *available at* http://www.ca9.uscourts.gov/datastore/media/2010/03/03/08-16971.wma ("Argument Recording").

[12] *Id.* at 31:37-32:52.

[13] *Id.* at 35:52-36:06.

[14] "Final action" on such a factual review "normally rests with the court of appeals." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 327-28 (1967).

Circuit cases on which Apollo relies, however, were all cases about *materiality*, not loss causation. *See Burlington Coat Factory*, 114 F.3d at 1425; *Oran*, 226 F.3d at 282; *Merck*, 432 F.3d at 268-71. Indeed, the Third Circuit has resisted any attempt to conflate these two distinct elements of a Rule 10b-5 cause of action, insisting that they are "different concepts." *Merck*, 432 F.3d at 275. Given the central role that these decisions play in Apollo's argument, it only makes sense to consider them (if at all) in a case where the particular argument that persuaded the Third Circuit has actually been preserved.

B. The Recent Grant in *Erica P. John Fund v. Halliburton* Is Irrelevant

Apollo's petition does not mention the pendency before this Court of *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403,[15] in which this Court granted certiorari on January 7, 2011.[16] However, a group of Apollo's *amici* argue that "taking this case in tandem with *Halliburton* would enable this Court to resolve the Circuit splits regarding the law of loss causation at the various stages of a case's life cycle in a comprehensive manner." Brief for Former SEC Commissioners and Law Professors as *Amici Curiae* in Support of Petitioners' Petition at 15.

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[15] The decision of the Fifth Circuit under review in *Halliburton* was reported as *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330, which is discussed *supra* pp. 19-20.

[16] Although Apollo's petition was filed on November 15, 2010, before the Court had granted certiorari in *Halliburton*, the Court had already invited the Solicitor General to file an *amicus* brief in that case on October 4, 2010, so Apollo certainly had notice that the Court was giving *Halliburton* serious consideration when it filed its petition, and could have addressed that petition if relevant.

This contention lacks merit. The questions on which this Court granted certiorari in *Halliburton* have to do with *when* investors must prove loss causation: whether they must "establish loss causation at class certification by a preponderance of admissible evidence," or whether instead a requirement that they do so amounts to "improper[] consider[ation of] the merits of the underlying litigation" at the certification stage. Pet. at i, No. 09-1403. In this case, by contrast, the class has long been certified, and that certification is not now contested. (The parties stipulated that all of the requirements of Rule 23 had been satisfied and stipulated to certification of the class. Dist. Ct. Dkt. Entries 116, 117.) The only question presented here is whether there was sufficient evidence to support the jury's finding for the investors on the merits. Nothing the Court is remotely likely to say in *Halliburton* will shed light on that issue. *See* Br. in Opp. at 18, No. 09-1403 (observing that petitioners in that case have not sought review on the merits of loss causation).

Even if the Court were somehow to reach the merits of the loss-causation issue in *Halliburton*, it would still be highly unlikely that its decision would be relevant to this case. Although petitioners contend that the decision in *Halliburton* conflicts with the decision below here, they do not even allege that the Fifth Circuit's decision is relevant to their first question presented, concerning the timing of corrective disclosures. As for the second question presented, concerning the degree to which analysis or commentary can serve as a corrective disclosure, the Fifth Circuit merely concluded, employing a fact-intensive analysis, that the district court in that case had not abused its discretion based on the evidence before it.

See 597 F.3d at 339-43. Were this Court to review and uphold that decision in *Halliburton*, it would cast no doubt on the Ninth Circuit's determination on the present, very different facts that the jury could reasonably find for plaintiffs here. As a result, the grant of review in *Halliburton* supports neither a grant nor a hold of the present petition.

IV. THE DECISION OF THE NINTH CIRCUIT IS CORRECT

Review is unjustified for one more reason: the Ninth Circuit was correct in reversing the district court's grant of judgment as a matter of law and reinstating the jury's verdict. A court reviewing a jury verdict "must interpret the entire record in the light most favorable" to the party that prevailed at trial, giving it "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be drawn." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S 585, 604 (1985). There was ample evidence to support the jury's inference that the September 20 analyses contained new, fraud-revealing information that contradicted petitioners' public statements and caused a statistically significant decline in Apollo's stock price.

The September 20 reports were the first to disclose the material changes to the enrollment counselor compensation system and the risks associated with those changes, and to note that then-current and former enrollment counselors told UBS that "turnover has increased since 6/04 intro of new comp plan." ER502. Dr. Feinstein explained to the jury that investors would have been concerned about "impacts on [Apollo's] sales and profits because of management distraction," because "the new incentive plan might not be as incentivizing as the old incentive plan," and

because "employee turnover [could occur] for that very same reason." ER121. He also testified that investors would have interpreted Flynn's reports as disclosing that "[s]omething bad happened as far as the fundamentals and performance of the company at the same time they changed the comp plan." ER180. Dr. Feinstein also tied the new, fraud-revealing information in the UBS reports to the statistically significant decline of Apollo stock on September 20 and 21.

The reports also told the market that the "contents of the DOE's recent program review may cause *more* concerns about [Apollo's] regulatory risk." ER502 (emphasis added).[17] That disclosure directly contradicted Nelson's September 7, 2004 claim that resolution of the DOE review "remove[d] any potential distractions from our management." ER572. And the jury could also infer that Flynn's reports, which traced the link between the DOE Report and Apollo's new compensation plan, informed the market for the first time that Nelson had lied when he stated that the new compensation plan was "unrelated" to the DOE Report and designed simply to make the system more "transparent." ER574.

Apollo sought to contradict this evidence of loss causation, by offering expert testimony that the decline in the stock price on September 20 and 21 was neither related to petitioners' fraud nor related to the publication of Flynn's reports, but was instead the result of a "random" decline. ER264-65. Apollo argued at length that there was "nothing new" in the

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[17] This reference to increased regulatory risk *specific* to Apollo also differs from a news article on September 15 that discussed "regulatory control" of the education "sector" and risks to the sector from increased congressional scrutiny. ER598.

UBS reports and that their contents had already been disclosed to investors. *See, e.g.*, Tr. 4007-14. Having heard this testimony and having weighed its credibility, the jury found for the investors.

Moreover, the district court's decision overturning the jury verdict was erroneous. The court's most obvious error was its reliance on Apollo's argument that "enrollment-counselor turnover actually decreased after the implementation of the new compensation plan." Pet. App. 11a. This argument was based on uncorroborated testimony from Apollo's director of human resources. *See id.* (citing Tr. 2408:1-2411:5); ER217-19. The court was not entitled to credit this testimony after the jury had rejected it. *See Reeves*, 530 U.S. at 151 (explaining that a court deciding a motion for judgment as a matter of law "must disregard all evidence favorable to the moving party that the jury is not required to believe"). Apollo conceded before the court of appeals that the jury "m[ight] be entitled to disbelieve" this testimony because it was offered by an adverse party witness.[18] *Id.* at 143 (jury may conclude that "defendant's explanation is pretextual").

The district court also erred when it ruled that the investors had failed to "link[] this claim to Apollo's misrepresentations." Pet. App. 11a. As just one example, Nelson's September 7 statement – which the jury found to be fraudulent – included statements that the settlement would not "have a material impact

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[18] Argument Recording at 19:27-19:32. This witness was impeached at trial when her testimony that the changes to Apollo's compensation plan were unrelated to the DOE Report was contradicted by an internal email indicating that Apollo's new compensation plan was designed to avoid "similar findings in the future" by DOE. ER367; *see also* ER352.

on [Apollo's] growth . . . or [it]s financial performance" and that the new compensation scheme was "unrelated" to the dispute with DOE. ER572, ER574. The jury could infer that the effect of the new compensation scheme *would* be material (through its effects on turnover and recruiters' incentives), that it was closely related to Apollo's dispute with DOE, and that these facts disclosed on September 20 were tightly linked to Apollo's misstatements and omissions and petitioners' failure to disclose the contents of the DOE Report, its demand for corrective action, and the material changes to the enrollment counselor compensation plan resulting from that call for corrective action. The same link applies to Flynn's statement that Apollo's enrollment targets were becoming harder to hit, which the jury could infer was a result of Apollo's new compensation plan.

Finally, the district court also erred when it rejected the investors' argument that Flynn's reports "tie[d] future regulatory problems to the DOE report." Pet. App. 11a. The point of this argument was that Flynn had diagnosed the problem as being worse than expected based on previously available information. *See* ER502 ("We . . . think contents of DOE's recent program review may cause more concerns about [Apollo's] regulatory risk."). The jury could reasonably infer that Flynn meant (and the market accepted) that Apollo's stock price before issuance of the September 20 Flynn reports was still overvalued in light of this risk. That reasonable inference provided support for the jury's conclusion that Flynn's research provided new information to the market.

In sum, the court of appeals correctly concluded that the district court had overstepped its bounds and usurped the jury's role by overturning its verdict.

That highly fact-specific determination does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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February 4, 2011

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Master File No. CV 04-2147-PHX-JAT (Lead)
CV 04-2204-PHX-JAT (Consolidated)
CV 04-2334-PHX-JAT (Consolidated)

CLASS ACTION

IN RE APOLLO GROUP INC. SECURITIES LITIGATION

This Document relates to: All Actions.

VERDICT FORM

We, the jury, duly empaneled and sworn in the above-entitled case, upon our oaths, do hereby find as follows:

SECTION 10(b) CLAIM AGAINST APOLLO

1. Did Apollo make an untrue statement of a material fact or omit a material fact necessary under the circumstances to keep the statements that were made from being misleading?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

If you answered all parts of Question 1 "no," leave Questions 2, 3, and 4 blank and proceed to Question 5. If you answered Question 1 "yes" as to any statement, answer Question 2 as to that statement. Do not answer Question 2 for any statement for which you answered Question 1 "no."

2. For any statement as to which a "yes" answer was given in Question 1, did Apollo act knowingly or recklessly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004.

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

If you answered Question 2 "no" as to all statements left over from Question 1, leave Questions 3 and 4 blank and proceed to Question 5. If you answered Question 2 "yes" as to any statement, answer Question 3 as to that statement. Do not answer Question 3 for any statement for which you answered Question 2 "no."

3. For any statement as to which a "yes" answer was given in Question 2, more specifically, did Apollo act knowingly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

Proceed to Question 4.

4. For any statement as to which a "yes" answer was given in Question 2, did that misrepresentation or omission cause the plaintiff to suffer damages? (By answering this question in the affirmative, you are finding that Apollo violated the securities laws.)

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

Proceed to Question 5.

SECTION 10(b) CLAIM AGAINST TODD NELSON

5. Did Todd Nelson make an untrue statement of a material fact or omit a material fact necessary under the circumstances to keep the statements that were made from being misleading?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004

Yes: X No: ____

If you answered all parts of Question 5 "no," leave Questions 6, 7, and 8 blank and proceed to Question 9. If you answered Question 5 "yes" as to any statement, answer Question 6 as to that statement. Do not answer Question 6 for any statement for which you answered Question 5 "no."

6. For any statement as to which a "yes" answer was given in Question 5, did Todd Nelson act knowingly or recklessly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

If you answered Question 6 "no" as to all statements left over from Question 5, leave Question 7 and 8 blank and proceed to Question 9. If you answered Question 6 "yes" as to any statement, answer Question 7 as to that statement. Do not answer Question 7 for any statement for which you answered Question 6 "no."

7. For any statement as to which a "yes" answer was given in Question 6, more specifically, did Todd Nelson act knowingly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

Proceed to Question 8.

8. For any statement as to which a "yes" answer was given in Question 6, did that misrepresentation or omission cause the plaintiff to suffer damages? (By answering this question in the affirmative, you are finding that Todd Nelson violated the securities laws.)

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Analyst Conference on March 12, 2004:

Yes: X No: ____

C) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

D) The Analyst Conference Call on June 24, 2004:

Yes: X No: ____

E) The Analyst Conference Call on August 25, 2004:

Yes: X No: ____

F) The Analyst Conference Call on September 7, 2004:

Yes: X No: ____

Proceed to Question 9.

SECTION 10(b) CLAIM AGAINST KENDA GONZALES

9. Did Kenda Gonzales make an untrue statement of a material fact or omit a material fact necessary under the circumstances to keep the statements that were made from being misleading?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

If you answered all parts of Question 9 "no," leave Questions 10, 11, and 12 blank and proceed to Question 13. If you answered Question 9 "yes" as to any statement, answer Question 10 as to that statement.

Do not answer Question 10 for any statement for which you answered Question 9 "no."

10. For any statement as to which a "yes" answer was given in Question 9, did Kenda Gonzales act knowingly or recklessly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ___

B) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

If you answered Question 10 "no" as to all statements left over from Question 9, leave Questions 11 and 12 blank and proceed to Question 13. If you answered Question 10 "yes" as to any statement, answer Question 11 as to that statement. Do not answer Question 11 for any statement for which you answered Question 10 "no."

11. For any statement as to which a "yes" answer was given in Question 10, more specifically, did Kenda Gonzales act knowingly with respect to that misrepresentation or omission?

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ___

B) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

Proceed to Question 12.

12. For any statement as to which a "yes" answer was given in Question 10, did that misrepresentation or omission cause the plaintiff to suffer damages? (By answering this question in the affirmative, you are finding that Kenda Gonzales violated the securities laws.)

A) The Press Release of Apollo Group, Inc., dated February 27, 2004:

Yes: X No: ____

B) The Form 10-Q dated April 13, 2004:

Yes: X No: ____

Proceed to Question 13.

SECTION 20(a) CLAIM AGAINST TODD NELSON

Answer Question 13 only if you answered Question 4 "yes." If you answered "no" to Question 4 or left it blank, leave Questions 13 and 14 blank and proceed to Question 15.

13. Did Todd Nelson possess, directly or indirectly, the actual power to direct or cause the direction of the management and policies of Apollo?

Yes: X No: ____

Proceed to Question 14.

14. Did the defendants prove by a preponderance of the evidence both that Todd Nelson did not directly or indirectly induce Apollo's violation of the securities laws and that he acted in good faith as that term is defined in the jury instructions?

Yes: ____ No: X

Proceed to Question 15.

Answer Question 15 only if you answered Question 12 "yes." If you answered "no" to Question 12 or left it blank, leave Questions 15 and 16 blank and proceed to Question 17.

15. Did Todd Nelson possess, directly or indirectly, the actual power to direct Kenda Gonzales?

Yes: X No: ____

Proceed to Question 16.

16. Did the defendants prove by a preponderance of the evidence both that Todd Nelson did not directly or indirectly induce Kenda Gonzales's violation of the securities laws and that he acted in good faith as that term is defined in the jury instructions?

Yes: ____ No: X

Proceed to Question 17.

Answer Question 17 only if you answered "yes" to Questions 4, 8, or 12. If you answered "no" to each of these questions or left them blank, sign and return the verdict form without answering any further questions.

17. Specify the total amount of damages per share that the plaintiff suffered as a result of the misrepresentation(s) or omission(s):

$ 5.55 per share

Proceed to Question 18.

18. What is the percentage of responsibility for the plaintiff's loss that you assign to each defendant whom you found in answers to Questions 4, 8, and/or 12 to have violated the securities laws? The total must add up to 100%. In determining the percentage of responsibility for each such defendant, you must consider: (1) the nature of the conduct of each defendant found to have caused or contributed to the loss incurred by the plaintiff; and (2) the nature and extent of the causal relationship between the conduct of each defendant and the damages incurred by the plaintiff.

	Percentage
Apollo	60
Todd Nelson	30
Kenda Gonzales	10
	= 100% Total

Sign and return this form.

9	1/16/08
(Presiding Juror Number)	(Date)